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IN SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1898.

ARANTY SAVINGS BANK,

Plaintiff in Error,

vs.

ALBERT BLADOW,

Defendant in Error.

rief for Plaintiff in Error.

S. B. PINNEY,
Attorney for Plaintiff in Error.

B. MORRILL and
EDWARD ENGERUD,
of Counsel for Plaintiff in Error.

(16984)

IN SUPREME COURT

OF THE UNITED STATES.

No. 399.

OCTOBER TERM, 1898.

GUARANTY SAVINGS BANK,

Plaintiff in Error,

vs.

ALBERT BLADOW,

Defendant in Error.

PLAINTIFF IN ERROR'S BRIEF.

This action was brought in the District Court of Richland County, North Dakota, to foreclose a mortgage on the North half of the Northeast quarter of section 24, Township 131 N., Range 50 W., and West half of the Northwest section 19, Township 131 N., Range 49

4 W., given by one Charley Anderson to one H. E. Fletcher and thereafter assigned to plaintiff in error. Bladow, defendent in error, alone answered. The case was submitted upon an agreed statement of facts which are in substance as follows: Anderson made proof and payment under the commutation clause of
5 the homestead law in due form and to the satisfaction of the register and receiver of the local land office, paid the required fees and commissions and the usual final certificate was issued to him. (Ast. pp. 7 and 8, fol. 11.) Thereafter, Anderson for the purpose of securing the sum of $450.00, made, executed and
6 delivered to H. E. Fletcher a mortgage covering the land involved, which mortgage was duly recorded in the office of the register of deeds of the proper county. This mortgage was on June 20, 1882, duly assigned to plaintiff in error and said assignment duly recorded. (Abst. p. 8, fol. 12.) The mortgage and assign
7 ment were each given and received in good faith in the regular course of business and for a valuable consideration. (Abst. p. 9, fol. 13.) On January 6, 1885, Bladow acquired by purchase the title held by Anderson. (Abst. p. 9, fol. 14.,) and after acquiring such title, to-wit,

on January 22, 1886, contested in the land department Anderson's patent certificate, (Abst. p. 10. fol. 14.) which was cancelled by the commissioner of the general land office under and by virtue of such contest. (Abst. p. 11 fol 17.) That in said contest neither the said H. E. Fletcher nor plaintiff in error were made parties, served with notice, or notified in any manner, and neither appeared in said contest before the land department. (Abst. p. 11, fol. 16.) On June 15, 1891, after the cancellation of Anderson's entry, and before patent was issued to Bladow, plaintiff in error filed in the land department proof of its interest as assignee of the mortgage and moved that patent be issued upon the final certificate of Anderson under the provisions of Section 7 of the Act March 3, 1891, (26 U. S. St. 1095.,) which motion was denied by the commissioner of the general land office, and upon appeal said decision was affirmed by the secretary of the interior. (Abst. pp. 11 and 12, fol. 17.) The fees and commissions paid by Anderson to the Government have never been repaid. (Abst. p. 11, fol 17.) Upon the facts presented the District Court decided in favor of defendant in error, confirming his title under the

patent issued to him by the Government of the United States and denying the foreclosure, setting aside and cancelling plaintiff in error's mortgage. (Abst pp. 12 and 13, fol. 19.) And upon appeal to the State Supreme Court the decision of the court below was sustained. (Abst. pp. 13, 14, 15, 16 and 17.)

SPECIFICATIONS OF ERROR.

First:—That plaintiff in error by virtue of Anderson's mortgage acquired an interest in the land of which it could not be deprived without being made a party of the proceedings in the Land Department, served with notice and given an opportunity to be heard.

Second:—That the cancellation of Anderson's entry by the Commissioner of the General Land Office on the ex-parte contest initiated by Bladow without notice to plaintiff in error was contrary to law and void.

Third:—The proceedings in the land Department leading up to the cancellation of Anderson's entry being irregular and void were of no effect, and said entry was therefore confirmed and patent thereunder should have been issued under section 7 of the Act of March 3, 1891, entitled "An act for the repeal of the Timber Culture Law and for other pur-

poses" upon the application of plaintiff in 16
error.

ARGUMENT.

In this case the entry made by Anderson was cancelled by the commissioner, on the contest initiated by Bladow, *in which case the mortgagee was not made a party defendant, or served with any notice whatever.* 17

While we do not deny the power of the commissioner, under certain conditions; to cancel an entry of public lands before patent, yet we do contend that such power is not arbitrary, unlimited or discretionary, but must be exercised in accordance with law.

Bogan v. Edinburg American Land 18
Mtg. Co. 63 Fed., 192.

Cornelius v. Kessell, 128 U. S., 446.

Lindsay v. Hawes, 2 Black, 554.

Stimson v. Clark, 45 Fed., 760.

Parsons v. Venzke, 164 U. S. 90. (L. Ed. 41, 360.)

Orchard v. Alexander, 157 U. S. 372. 19
(L. Ed. 39, 737.)

In case of Bogan v. Mortgage Co., Supra., Judge Sanborn, in rendering the decision for the court, says: "The supervisory or reviewing power of the commissioner of the

land office, or of the secretary of the interior, is not an arbitrary, unlimited or discretionary power, but a power that must be exercised according to law, or not in violation or in disregard of it."

In case of Parsons v. Venzke, Supra., the court in speaking of the jurisdiction of the land department says that such jurisdiction is "a jurisdiction not arbitrary or unlimited, *nor to be exercised without notice to the parties interested.*" In the case at bar Anderson was in no way interested in the contest prosecuted by Bladow. He at that time had no interest in the land, or in the result of the contest, and yet he was the only party proceeded against or served with notice. Plaintiff in error, who was the only party interested, was not notified in any manner or even made a party to the contest proceedings. Proof and payment had been made by Anderson, which proof and payment had been accepted by the Register and receiver as the agents of the government and final certificate and receipt issued to him. By such purchase the land embraced in the certificate became subject to all the incidents of private ownership, including taxation, and Anderson could legally mortgage or transfer it

before the issuance of a patent from the 24
government.

Carroll v. Safford, 3 How., 450.

Witherspoon v. Duncan, 4 Wall., 210.

United States v. Budd, 144 U. S., 154.

This being so, it necessarily follows that the mortgagee acquired a property interest therein, and while it is true the mortgagee ac- 25
quired no greater right than the entryman, it is also true that the right acquired was no less. The cancellation of Anderson's entry, destroyed the right of the mortgagee as well as the right of Anderson. And we here apply the rule laid down by the court in Bogan v. Mortgage Co., as above quoted, and say that 26
while it was within the province of the commissioner of the general land office to cancel Anderson's entry if that entry was fradulent, yet we say that it was not within the power of the commissioner to arbitrarily cancel that entry and deprive the mortgagee of a vested right without notice, or an opportunity to be 27
heard, or even being made a party to the proceedings under which that entry was cancelled.

The power of the commissioner must be exercised according to law and not in violation of it, and we do not believe that any one will

maintain that the depriving of a person of a vested right to the extent of $450 without notice and without even being made a party to the proceedings is according to law. In fact it is in direct violation of all principles of law and Article 5, of the Constitutional Amendment, which provides that no person shall "*be deprived of life, liberty or property without due process of law.*"

Due process of law, is law in the regular course of administration through courts of justice after *due notice and an opportunity to appear and be heard.*

2 Kent Com. 13.

Westervelt v. Greggs 12 N. Y. 202.

Bank of Columbia v. Okely, 4 Wheat, 235

Hurtado v, California, 110 U. S. 516.

Leeper v. Texas 139 U. S. 457.

In this country property rights of an individual cannot be lawfully divested *without granting him a hearing.*

Windsor v. McVeigh 93 U. S., 274.

Lewis v. Shaw, et. al., 57 Fed. 516.

Hollingsworth v. Barbour, 4 Pet., 466.

Woodruff v. Taylor, 20 Vt. 65.

In the latter case in speaking upon this point

the court says: "A proceeding professing to de- 32
termine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

This language is quoted with approval by 33
Justice Field in Windsor v. McVeigh, Supra.

While we grant the power of the Commissioner of the general land office to cancel an entry before patent, yet we do not concede that the commissioner of the land department has any greater power than a duly established court of justice would have, and no one would 34
contend that a decree of the highest court in the land could adjudicate the right of an individual without making him a party to the proceedings and serving him with notice.

It is certain that after purchase Anderson had the legal right to mortgage the land, and the mortgagee had the legal right to accept the 35
mortgage. This being so it must follow as a matter of course that the mortgagee had a property right in the land to the extent of the mortgage. And if the land department had the power to pass upon and adjudicate that

property right, that power must in a certain sense be a judicial power, and the process of adjudication a judicial process.

The rights of the mortgagee were a matter of record, and Bladow, the complaining party in those proceedings, had notice not only from those records but from his deed in which the mortgage is described.

The proceedings were ex-parte, substituted service being made upon Anderson, who had no interest in the land at that time, and the cancellation of Anderson's entry by Bladow's contest was an easy way of removing the encumbrance of the mortgage then against Bladow's title. There appears a good reason why Bladow did not make plaintiff in error a party to the contest and serve it with a notice of the proceedings. By so doing *Bladow's true position* would have appeared before the land department, and plaintiff in error might have been able to submit testimony refuting the charge made against Anderson's entry. As it was, the contest was in effect Bladow v. Bladow.

The question is, did the land department have jurisdiction? Did the department acquire jurisdiction in an action making Anderson the only defendant, when Andersen was not a party

in interest and had no rights to be adjudicated in an action surreptitiously brought by Bladow to set aside his own title for the express and only purpose of defeating the mortgage? Could the commissioner of the general land office hear, try and determine the rights of plaintiff in error in an action in which it was not even made a party, and yet was the only real party in interest and the only party that would suffer by a decision adverse to the entry? We believe that the decisions cited and that part of article five of the Constitutional Amendment which provides that no person shall "be deprived of life, liberty or property without due process of law" is sufficient answer.

If our position upon this point is correct then the cancellation of Anderson's entry was void, and the entry remains as though it had never been cancelled, and patent for the land should have been issued upon the application of the plaintiff in error for patent under section 7 of the Act of March 3d, 1891, entitled "An Act for the Repeal of the Timber Culture Law, and for Other Purposes." (26 St. 1095) That portion of Section 7 of said Act which relates to this case provides as follows: "And all entries made under pre-emption, homestead,

desert land, or timber culture laws, in which final proof and payment *may have been made and certificate issued; and to which there are no adverse claims originating prior to final entry, and which have been sold or encumbered prior to the first day of March, eighteen hundred and eighty eight, and after final entry, to bona fide purchasers, or encumbrancers for a valuable consideration*, shall, unless upon investigation by a government agent, fraud on the part of the purchaser has been found, *be confirmed and patented* upon presentation of satisfactory proof to the land department of such sale or encumbrance."

That provision is wholly remedial and under the familiar rules of construction, the broadest possible scope toward effecting the object for which it was enacted, that its language will imply must be given to it. Remedial statutes are to be liberally construed to suppress the evil and advance the remedy.

Suth. Stat. Cons., Section 207.

Hulder v. Golden, 36 N. Y., 446.

Cullerton v. Mead, 22 Cal., 96.

Oates v. First National Bank, 100 U. S. 239.

Smith v. Stevens, 82 Ill., 554.

C. B. & Q. R. R. Co., vs. Dunn, 52 Ill, 48
260.

Rockford, Rock Island and St. Louis R. R.
Co. v. Heflin, 65 Ill., 366.

Hudley v. Morrison, 39 Ill., 392.

And generally it may be affirmed that if a statute may be liberally construed, everything is to be done in advancement of the 49
remedy, or the purpose intended, that can be done consistently with any construction that can be put upon it. The substance of the act is principally regarded and the letter is not too closely adhered to.

Suth. Stat. Const. Sec. 410.

We presume no one will question the 50
proposition that the design of this law is to afford protection to good faith purchasers or incumbrancers after final entry and before patent of lands acquired under the public land laws named; and it is clearly apparent that it is intended to *cover past transactions.*

The conditions that must exist in order to 51
bring an entry within the curative operation of the law, exist in this case. All that is necessary is an entry under the pre-emption, homestead, desert lands or timber culture laws, in which final proof and payment may have

been made and certificate issued; there must be no adverse claim originating prior to final entry; the land embraced in the entry must have been sold or incumbered for a valuable consideration, to a party holding under the incumbrance, or lien, in good faith, subsequent to date of final entry and prior to March 1, 1888.

All these conditions exist as to the mortgage and Anderson's entry.

The language of the law shows that it was the intention of congress to confirm every entry of public lands of the class described in the second clause of said section, and we base our contention in this regard on the language of the clause, the words of which are as follows: "*And all entries . . . in which final proof may have been made and certificate issued*" *shall be confirmed and patented.* The gist and intent of this clause is to protect the good faith purchaser or incumbrancer of lands after entry and before patent, and as a condition to receiving the benefits of the law, his good faith must be established and no fraud found in him.

The good faith of the incumbrancer in this case is admitted, the agreed statement of facts show that the mortgage was accepted by the

mortgagee in good faith in the regular course 56
of business, and our contention is simply this, that the cancellation of Anderson's entry was illegal and void and of no effect, and that the Act of March 3, 1891, having been passed prior to the final proof of Bladow, this entry comes within the curative provisions of that Act and should have been patented under the 57
application of plaintiff in error for patent, and the decision of the secretary of the interior upon the application for patent under said Act. should have been in favor of the application and issuing of patent to Anderson.

The decision of the secretary of the interior upon that question not being upon a question 58
of fact, but upon a question of law, is not binding upon the court and can be reviewed in these proceedings.

While the general provision is recognized that where the land department or any other special tribunals is authorized to hear and determine certain matters, its decisions within 59
the scope of its authority are conclusive, yet where such tribunals have mistaken the law or committed errors, courts of justice have always had the power to inquire into and correct mistakes, injustice and errors. This point has been passed upon by the Supreme Court of

the United States in many well adjudicated cases, the most notable of which are;

Johnson v. Tousley, 13 Wall., 72.

Stark v. Starrs, 6 Wall., 402.

Lindsey v. Hawes, 2 Black, 554.

Cornelius v. Kessell, 128 U. S., 456.

Widdicombe v. Childers, 124 U. S., 530.

Bernier v. Bernier, 147 U. S., 242.

In the case of Perry v. O'Hanlan, 11 Mo., 373, it was held that where the commissioner of the general land office had acted without authority in cancelling an entry, the cancellation would be held for naught in a court of law.

In the case of Risdon v. Davenport, 57, N. W. 482, a case recently decided by the supreme court of South Dakota. The Court says, "The answer alleges that no personal service was made, and no affidavit made or filed justifying service by publication, and that Conway in no manner appeared in such proceedings. The result of these pleaded facts is that both the local land office and the commissioner of the general land office—it does not appear how the case got before the commissioner—undertook to investigate and adjudicate upon the right of Conway to this land, for which he held a receiver's receipt, without jurisdiction. This they could not do; and upon such facts their decision, like that of a court without jurisdiction, would

be void, and would be so held in a collateral 64
proceeding. This proposition without respect to courts, is so thoroughly established as to require no supporting citations. See American & English Enc. Law, p. 311. If courts clothed with full judical powers can legally act only upon such persons and matters as have by proper process been brought under their jurisdiction, 65
it cannot be that a quasi judicial officer can summarily dispose of vested rights without notice to the holder and opportunity to be heard. Appellant argues that these officers, on account of the nature of their powers and duties, and the general control which they have over the matters of law committed to them, should be regarded as courts of general jurisdiction, and, 66
consequently, that every reasonable presumption should be indulged in to sustain their jurisdiction; but, even if this were so, there is no room for presumption here. In such cases it is presumed, in the absence of evidence, that the facts existed which were necessary to confer jurisdiction; but such presumption cannot pre- 67
vail against the established fact that they did not exist."

So in this case the fact exists that the land department attempted to adjudicate the rights of plaintiff in error without it being even a party to the proceedings or given an oppor-

68 tunity to be heard. Again the Court says that in cancelling Conway's entry, the land department could only do so when acting judicially, and it could not act judicially in a matter over which it had no jurisdiction. We call special attention to this case and the authorities cited as being directly in point with the case at bar.

69 The State Supreme Court recognizes the distinction between the case of Parsons v. Venzke, Supra, and the case at bar, but fail to apply the true rule. Judge Corliss in rendering the opinion for the court says that the only feature which distinguishes this case from Parsons v. Venzke, is the fact that the holder of the mortgage was not made a party to the pro-
70 ceedings in the land department which resulted in the cancellation of Anderson's entry. (Abst. p. 14, fol. 21.) The court bases its decision upon the presumption that until patent issues the land department had complete control over the land, and that its power is not dependent upon jurisdiction over the person of any one;
71 and no matter how arbitrarily it may act, its cancellation is not a mere nullity. We contend that the land department had no power to arbitrarily cancel a final certificate when once issued. True it can suspend the issuance of a patent and call for additional evidence, or it may take steps looking toward the cancella-

tion or setting aside of the certificate, but it 72
cannot without notice and of its own motion, cancel such certificate, thereby depriving the entryman and all parties in interest of an opportunity to be heard. The proof upon which the certificate is based may be defective and not warrant the issuance of a patent thereon, but in such case the entryman must be given an opportu- 73
nity to remedy the defect before the certificate can be finally cancelled and set aside, and if the original entryman had parted with his interest, the one then interested can appear and defend his rights and furnish any evidence necessary to cure the defect and must be notified for that purpose and made a party of the proceedings. 74

Under the rule laid down by the court, in its opinion, any person can file ex-parte affidavits, or present testimony to the land department, against any entry before patent issues and upon such showing the department can cancel the entry without notice to the entryman, or anyone else. Surely such a practice cannot 75
be sanctioned and is not in accordance with the decisions of this and other courts as herein cited. The land department can suspend the issuing of a patent, and it can cancel a final or patent certificate, but it cannot act without notice, not only to the entryman, but to all

parties interested. Another point in this case is the fact that the certificate was cancelled by the department, not upon proceedings instituted by the department, but upon a contest initiated and prosecuted by Bladow, who had knowledge of the interest of the plaintiff in error and concealed that interest. We submit that the cancellation of Anderson's entry was a nullity, and that the entry was confirmed under section 7 of the act of March 3, 1891, and the land department erred in not issuing a patent to Anderson upon the application of plaintiff in error.

Respectfully submitted,

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